

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

7 RICHARD M. CHUDACOFF, M.D., ) 2:08-CV-863-ECR-RJJ  
8 Plaintiff, )  
9 vs. ) **ORDER**  
10 )  
11 UNIVERSITY MEDICAL CENTER OF )  
12 SOUTHERN NEVADA, a political )  
subdivision of Clark County, )  
13 State of Nevada, COUNTY )  
COMMISSIONERS BRUCE L. WOODBURY, )  
14 TOM COLLINS, CHIP MAXFIELD, )  
LAWRENCE WEEKLY, CHRIS )  
GIUNCHIGLIANI, SUSAN BRAGER, )  
AND RORY REID, )  
15 KATHLEEN SILVER, an individual, )  
THE MEDICAL AND DENTAL STAFF OF )  
16 THE UNIVERSITY MEDICAL CENTER OF )  
SOUTHERN NEVADA, an independent )  
17 subdivision of University Medical )  
Center of Southern Nevada, JOHN )  
18 ELLERTON, M.D., an individual, )  
MARVIN J. BERNSTEIN, M.D., an )  
19 individual, DALE CARRISON, M.D., )  
an individual, DONALD ROBERTS, )  
20 M.D., an individual, DOE )  
Defendants 1 through X, inclusive; )  
21 and ROE Corporations, A through Z, )  
inclusive, )  
22 )  
Defendants. )  
23 )

25 This case arises out the suspension of a physician's medical  
26 staff privileges with the University Medical Center of Southern  
27 Nevada. Two motions are presently pending before the Court.

1 First is the plaintiff's Motion for TRO and Preliminary  
2 Injunction (#85), which was filed on January 9, 2009. The Court  
3 denied (#87) the motion (#85) to the extent that it sought a TRO and  
4 stated that it would treat the motion (#85) solely as one for  
5 preliminary injunction. The defendants in this action fall into two  
6 groups; one group of the defendants, but not the other, filed an  
7 Opposition (#92) to the motion (#85) on January 26, 2009. The  
8 plaintiff filed a Reply (#99) on January 30, 2009.

9 Next is the plaintiff's Motion for Partial Summary Judgment  
10 (#86), which the plaintiff also filed on January 9, 2009. Again,  
11 the first group of defendants filed an Opposition (#93) to the  
12 motion on January 26, 2009. This time, however, the other group of  
13 defendants filed a joinder (#94) to the opposition (#93). The  
14 plaintiff filed a Reply (#97) on January 28, 2009.

15 The motions are ripe, and we now rule on them.

## I. Factual Background

18 Plaintiff Dr. Richard Chudacoff (or "Chudacoff"), a physician  
19 who specializes in the practice of Obstetrics and Gynecology, had  
20 medical privileges to work at several local hospitals in the Las  
21 Vegas area, including University Medical Center of Southern Nevada  
22 (or "UMC"). (P.'s Second Amended Complaint ("SAC") ¶¶ 17, 18, & 24  
23 (#82).) In 2007, Chudacoff was appointed to the position of  
24 Assistant Professor with the University of Nevada School of  
25 Medicine, and on December 20, 2007, Chudacoff was granted staff  
26 privileges at the University Medical Center of Southern Nevada in  
27 the Obstetrics and Gynecology department. (Id. ¶¶ 25, 26.)

1 Chudacoff worked at the UMC from December 20, 2007, through May  
2 28, 2008. (Id. ¶ 27.) Part of Chudacoff's work involved overseeing  
3 resident physicians. Chudacoff thought that the residents' skills  
4 were substantially below the skill level of other residents that he  
5 had supervised previously in his career at a different medical  
6 school. (Id. ¶¶ 28, 29.)

7 To address these concerns, on April 16, 2008, Chudacoff wrote  
8 an email to Paul G. Stumpf, M.D., Professor and Chair of Obstetrics  
9 and Gynecology at the University of Nevada School of Medicine,  
10 regarding his "concerns over the skills of the obstetrical and  
11 gynecological residents at the University Medical Center of Southern  
12 Nevada." (Id. ¶ 31.) Chudacoff made several recommendations for  
13 improving the quality of care that the residents provided. (Id.)

14 On May 28, 2008, Chudacoff received a letter from Defendant  
15 John Ellerton, M.D., Chief of Staff at the UMC, "in which Chudacoff  
16 was told that the Medical Executive Committee . . . had suspended,  
17 altered or modified his medical staff privileges." (Id. ¶ 31.) In  
18 addition, the Medical Executive Committee (or "MEC") had ordered  
19 Chudacoff to undergo drug testing and physical and mental  
20 examinations. (Id.) Chudacoff alleges that he had no knowledge  
21 that "the Medical Staff was considering altering or changing his  
22 privileges." (Id. ¶ 32.)

23 Chudacoff also alleges that he was advised that he was entitled  
24 to a Fair Hearing in the May 28 letter; however, he was not advised  
25 of the allegations presented against him. (Id. ¶ 39.) On June 2,  
26 2008, Chudacoff's insurance counsel requested a Fair Hearing. (Id.  
27 ¶ 41.) On June 10, 2008, Chudacoff received a letter from

1 University of Nevada-Reno President Milton Glick informing Chudacoff  
2 that his employment with the University of Nevada School of Medicine  
3 had been terminated as a result of the suspension of Chudacoff's  
4 clinical privileges. (Id. ¶ 43.)

5 On June 16, 2008, the UMC filed a report with the National  
6 Practitioner Data Bank (or "NPDB") stating that Chudacoff's  
7 privileges had been suspended indefinitely for substandard or  
8 inadequate care and substandard or inadequate skill level. (Id. ¶  
9 44.) The report to the National Practitioner Data Bank cites four  
10 cases where Chudacoff caused "serious operative complications during  
11 gynecological surgery," one incident where Chudacoff failed to  
12 respond to a medical emergency, and numerous complaints of  
13 disruptive behavior. (Id. ¶ 45.) On June 18 and 20, 2008,  
14 Chudacoff was notified by different health care facilities that his  
15 privileges had been denied or revoked because of the information  
16 listed on the NPDB. (Id. ¶¶ 46, 47.) On June 23, 2008, Chudacoff  
17 received the Medical Record numbers for the patients involved in the  
18 NPDB report. (Id. ¶ 48.)

19 Having received no response to his request for a Fair Hearing,  
20 on July 2, 2008, Chudacoff filed the original complaint in this  
21 case. On July 18, 2008, Chudacoff was informed that his Fair  
22 Hearing was scheduled for September 11, 2008. Initial discovery  
23 motions and notices of depositions were filed by the parties  
24 throughout the summer.

25 While the litigation progressed, the Fair Hearing was held on  
26 September 11, 2008. Prior to the hearing, on September 5, 2008, the  
27 MEC disclosed its list of witnesses for the Fair Hearing, but  
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1 Chudacoff received no information regarding the nature of the  
2 testimony that would be elicited from those witnesses. Because of  
3 this delay, Chudacoff had to prepare his case for the MEC without  
4 having knowledge of the allegations against him. Additionally,  
5 though Chudacoff's attorney was present at the September 11 hearing,  
6 his attorney was not allowed to present evidence, question  
7 witnesses, or participate in the hearing in any substantive way.

8 (Id. ¶ 54.)

9 Aside from addressing the incidents of "substandard care," the  
10 Fair Hearing Committee seemed concerned with a discrepancy in  
11 Chudacoff's original medical staff application: Chudacoff reported  
12 never having an adverse action taken against him for his practice of  
13 medicine. (Id. ¶ 58.) In fact, he had a negative report during his  
14 time in the Navy, but that report was later revised by the District  
15 Court of the District of Columbia. Chudacoff had not been informed  
16 that this topic would be addressed at the hearing.

17 On October 1, 2008, the Fair Hearing Committee set forth their  
18 findings and made recommendations regarding the MEC's sanctions.  
19 The Fair Hearing Committee disagreed with the suspension of  
20 Chudacoff's privileges and the requirement of direct supervision by  
21 another physician. Instead, the committee recommended peer review  
22 of Chudacoff's practice. The Fair Hearing Committee agreed with  
23 three of the MEC's sanctions: (1) placing Chudacoff on a "zero  
24 tolerance policy for disruptive behavior"; (2) requiring Chudacoff  
25 to discuss with the Nevada Health Professionals Foundation the  
26 necessity of undergoing physical and psychological evaluation; and  
27 (3) requiring Chudacoff to undergo drug testing. The Fair Hearing  
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1 Committee also noted that the "concern about Dr. Chudacoff's  
2 falsifying his medical staff application should be specifically  
3 addressed to the MEC with appropriate action."

4 The Fair Hearing Committee's recommendations were forwarded to  
5 the MEC for consideration at its next hearing, which was held on  
6 October 28, 2008. (Id. ¶ 57.) At that hearing, at which Chudacoff  
7 was present, the MEC reviewed and considered the Fair Hearing  
8 Committee's recommendations. The purpose of the hearing was to  
9 address the Fair Hearing Committee's recommendations related to  
10 Chudacoff's alleged incidents of substandard care. Nevertheless, at  
11 least one of the members of the MEC focused almost exclusively on  
12 Chudacoff's alleged falsification of his medical staff application.  
13 (Id. ¶ 57.)

14 Ten days after the MEC's hearing – November 7, 2008 – the MEC  
15 notified Chudacoff of its decision. The MEC adopted in part the  
16 findings of the Fair Hearing Committee with respect to requiring  
17 peer review of Chudacoff's practice. (Id. ¶ 62.) In addition, the  
18 MEC issued a second letter suspending Chudacoff's privileges pending  
19 revocation for "material misstatements of fact on [Chudacoff's]  
20 medical staff application for privileges." Each letter now  
21 represents a separate action taken by the MEC.

22 Pursuant to the provisions of the Fair Hearing Plan, Chudacoff  
23 had thirty days – or until December 7, 2008 – to appeal his  
24 suspension relating to the misstatements on the application to a  
25 Fair Hearing Committee, as that decision had not yet been presented  
26 to the Fair Hearing process. Once the MEC suspended Chudacoff's  
27 privileges, the MEC had the obligation to report the suspension to  
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1 the National Practitioner Data Bank within fifteen days – or by  
2 November 22, 2008. With respect to this potential report, the Court  
3 issued a preliminary injunction that prevented the defendants from  
4 reporting Chudacoff to the NPDB.

5 Chudacoff requested a Fair Hearing as to the suspension related  
6 to the alleged misstatements of fact on his medical staff  
7 application of his privileges. On November 25, 2008, at 9:10 a.m.,  
8 Chudacoff's attorney was informed that the MEC would meet at 12:30  
9 p.m. that day to discuss the discrepancy in Chudacoff's application.  
10 (*Id.* ¶ 65.) Chudacoff presented his case; less than one hour later  
11 the MEC informed him that the MEC would proceed with the suspension  
12 of his privileges. (*Id.* ¶ 68.)

13 Also on November 25, 2008, Chudacoff timely appealed the  
14 adoption of the Fair Hearing Committee's recommendations with  
15 respect to the substandard level of care issues to the Board of  
16 Trustees.<sup>1</sup> At a session in early 2009, the Board appears to have  
17 sided with Chudacoff in a great number of respects. As a result of  
18 the Board's actions, the MEC must now reconsider its initial  
19 decision to report Chudacoff to the NPDB for the substandard level  
20 of care issue. The Board also mentioned that it may need to re-  
21 write the reporting policies to ensure that a physician is afforded  
22 sufficient procedural due process before being suspended. In  
23 addition, the Board awarded Chudacoff \$10,000 to pay for costs and  
24 fees associated with the dispute. The MEC is yet to reconsider its  
25 actions.

26 \_\_\_\_\_  
27 <sup>1</sup>The members of the Clark County Board of Commissioners comprise  
the Board of Trustees.

## II. Procedural Background

2 Chudacoff originally filed suit (#1) on July 2, 2008, alleging  
3 claims of violation of due process under the Fourteenth Amendment  
4 and assorted state law claims. Chudacoff seeks declaratory and  
5 injunctive relief, as well as money damages and attorney's fees.

6 All of the defendants – the University Medical Center, its  
7 Commissioners, several individual physicians and others who serve on  
8 administrative committees for the medical center, and every  
9 physician and dentist who holds staff privileges at the medical  
10 center – filed an Answer (#23) to the complaint on July 23, 2008.  
11 Chudacoff filed an amended complaint #46) on September 22, 2008; the  
12 defendants answered (#47) that complaint on October 2, 2008.  
13 Chudacoff filed a second amended complaint (#82) on January 6, 2009,  
14 to which the defendants filed answers (## 95, 96). The second  
15 amended complaint varies from the original complaint in only minor  
16 areas and adds an additional cause of action under the United States  
17 Constitution.

18 The Court held a hearing on January 5, 2009, to consider  
19 pressing motions filed by both sides. The defendants had filed an  
20 Emergency Motion (#48) to Dismiss or Alternatively to Stay the  
21 Instant Matter Pending Exhaustion of All Administrative Remedies and  
22 Proceedings. Chudacoff had filed Emergency Motions (## 55, 57) for  
23 Temporary Restraining Order/Preliminary Injunction. The defendants  
24 sought to dismiss the case on the basis of immunity under the Health  
25 Care Qualified Immunity Act (or "HCQIA"). We denied the defendants'  
26 motion, reasoning that it was inappropriate to resolve the HCQIA  
27 matter at the motion to dismiss stage, as the issue turned on

1 questions of fact. We also granted Chudacoff's motion for  
2 preliminary injunction and enjoined the defendants from reporting  
3 any negative information regarding Chudacoff's suspension of medical  
4 staff privileges as a result of his allegedly falsified application.

5 Chudacoff then sought an order requiring the defendants to  
6 remove any negative information they had already reported with the  
7 NPDB with respect to the alleged incidents of insufficient medical  
8 care. Chudacoff argues that because his due process rights were  
9 violated, the defendants should be required to remove any negative  
10 information they reported about him. To this end, Chudacoff filed  
11 his Emergency Motion (#85) for Temporary Restraining Order and  
12 Preliminary Injunction ("P.'s Mtn. for TRO and PI") on January 9,  
13 2009. Only one group of the defendants – the medical and dental  
14 staff of the UMC, John Ellerton, Marvin Bernstein, Dale Garrison,  
15 and Donald Roberts – filed a response (#92) to the motion. The  
16 other defendants in the action – Bruce Woodbury, Tom Collins, Chip  
17 Maxfield, Lawrence Weekly, Chris Giunchigliani, Susan Brager, the  
18 UMC itself, Rory Reid, and Kathleen Silver – filed nothing in  
19 response to the motion (#85).

20 Additionally, Chudacoff filed a Motion (#86) for Partial  
21 Summary Judgment ("P.'s Mtn. for PSJ"), arguing no genuine issues of  
22 material fact existed with respect to his claim that the defendants  
23 had violated his due process rights. The first group of defendants  
24 filed a response (#93) to the motion, and this time, the second  
25 group of defendants filed a Joinder (#94) to the response.

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### III. Motion for Partial Summary Judgment

2 Chudacoff's motion for partial summary judgment is limited to  
3 whether the defendants violated his due process rights by suspending  
4 his hospital privileges – and then reporting that suspension to the  
5 NPDB – without notice or an opportunity to be heard. The only facts  
6 relevant here concern whether Chudacoff was denied procedural due  
7 process before the defendants reported him to the NPDB with respect  
8 to his allegedly substandard level of care. If we find that the  
9 defendants deprived Chudacoff of a protected interest without due  
10 process, then we must evaluate whether the defendants are entitled  
11 to immunity under the Health Care Quality Improvement Act ("HCQIA"),  
12 42 U.S.C. § 11101, et. seq.

#### A. Standard

15 Summary judgment allows courts to avoid unnecessary trials  
16 where no material factual dispute exists. N.W. Motorcycle Ass'n v.  
17 United States Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994).  
18 The court must view the evidence and the inferences arising  
19 therefrom in the light most favorable to the nonmoving party,  
20 Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should  
21 award summary judgment where no genuine issues of material fact  
22 remain in dispute and the moving party is entitled to judgment as a  
23 matter of law, FED. R. CIV. P. 56(c). Judgment as a matter of law is  
24 appropriate where there is no legally sufficient evidentiary basis  
25 for a reasonable jury to find for the nonmoving party. FED. R. CIV.  
26 P. 50(a). Where reasonable minds could differ on the material facts  
27 at issue, however, summary judgment should not be granted. Warren

1 v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied,  
 2 116 S.Ct. 1261 (1996).

3       The moving party bears the burden of informing the court of the  
 4 basis for its motion, together with evidence demonstrating the  
 5 absence of any genuine issue of material fact. Celotex Corp. v.  
 6 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met  
 7 its burden, the party opposing the motion may not rest upon mere  
 8 allegations or denials in the pleadings, but must set forth specific  
 9 facts showing that there exists a genuine issue for trial. Anderson  
 10 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the  
 11 parties may submit evidence in an inadmissible form - namely,  
 12 depositions, admissions, interrogatory answers, and affidavits -  
 13 only evidence which might be admissible at trial may be considered  
 14 by a trial court in ruling on a motion for summary judgment. FED.  
 15 R. Civ. P. 56(c); Beyene v. Coleman Security Services, Inc., 854  
 16 F.2d 1179, 1181 (9th Cir. 1988).

17       In deciding whether to grant summary judgment, a court must  
 18 take three necessary steps: (1) it must determine whether a fact is  
 19 material; (2) it must determine whether there exists a genuine issue  
 20 for the trier of fact, as determined by the documents submitted to  
 21 the court; and (3) it must consider that evidence in light of the  
 22 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary  
 23 Judgement is not proper if material factual issues exist for trial.  
 24 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.  
 25 1999). "As to materiality, only disputes over facts that might  
 26 affect the outcome of the suit under the governing law will properly  
 27 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.

1 Disputes over irrelevant or unnecessary facts should not be  
2 considered. Id. Where there is a complete failure of proof on an  
3 essential element of the nonmoving party's case, all other facts  
4 become immaterial, and the moving party is entitled to judgment as a  
5 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a  
6 disfavored procedural shortcut, but rather an integral part of the  
7 federal rules as a whole. Id.

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9 **B. Procedural Due Process**

10 The Fourteenth Amendment prevents states from depriving  
11 individuals of protected liberty or property interests without  
12 affording those individuals procedural due process. Bd. of Regents  
13 of State Colls. v. Roth, 408 U.S. 564, 569 (1972). With procedural  
14 due process claims, the deprivation of the protected interest "is  
15 not itself unconstitutional; what is unconstitutional is the  
16 deprivation of such an interest without due process of law."  
17 Zinermon v. Burch, 494 U.S. 113, 125 (1990). Before being deprived  
18 of a protected interest, a person must be afforded some kind of  
19 hearing, "except for extraordinary situations where some valid  
20 government interest is at stake that justifies postponing the  
21 hearing until after the event." Boddie v. Conn., 401 U.S. 371, 379  
22 (1971). In evaluating procedural due process claims, the Court must  
23 engage in a two-step inquiry: (1) we must ask whether the state has  
24 interfered with a protected liberty or property interest; and (2) we  
25 must determine whether the procedures "attendant upon that  
26 deprivation were constitutionally sufficient." Humphries v. County

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1 of Los Angeles, 554 F.3d 1170, 1184-85 (9th Cir. 2009) (quoting Ky.  
 2 Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989)).  
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4 **1. Protected Property Interest**

5 A protected liberty or property interest is one that is  
 6 "recognized and protected by state law." Paul v. Davis, 424 U.S.  
 7 693, 710 (1976). For example, when a state issues drivers'  
 8 licenses, which confer citizens the right to operate a vehicle in  
 9 that state, the state may not withdraw that right without affording  
 10 due process. Id. (citing Bell v. Burson, 402 U.S. 55, 535 (1971)).

11 Just as Nevada grants licenses to its drivers, so too does it  
 12 grant licenses to qualified physicians to practice medicine. In  
 13 Nevada, Chapter 630 of the Revised Statutes generally governs the  
 14 licensing of physicians in the state. See NEV. REV. STAT. §§  
 15 630.003-630.411; see also Moore v. Bd. of Trustees of Carson-Tahoe  
 16 Hosp., 495 P.2d 605, 608 (Nev. 1972) (recognizing a "right . . .  
 17 subject to . . . reasonable rules and regulations" to "enjoy medical  
 18 staff privileges in a community hospital"). Further, the UMC's  
 19 bylaws and regulations provide for extending privileges to  
 20 physicians to practice at the hospital provided that certain  
 21 requirements are met. (See Bylaws, Ex. A (#85-4); Credentialing  
 22 Manual, Ex. B (#85-4); Fair Hearing Plan, Ex. L (#48-5).) A  
 23 physician's medical staff privileges are thus a protected interest  
 24 under Nevada state law.

25 Chudacoff was both a licensed physician in the state and he had  
 26 medical staff privileges at the UMC. The defendants have attempted  
 27 to revoke Chudacoff's privileges at the UMC. This protected  
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1 interest cannot be revoked without constitutionally sufficient  
2 procedures.

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4 **2. Whether the Procedures Were Constitutionally Sufficient**

5 Chudacoff argues that because he was not "summarily suspended,"  
6 the defendants were required to follow the process for "routine  
7 administrative" actions as set forth by the UMC Bylaws and its Fair  
8 Hearing Plan. (P.'s Mtn. for PSJ at 12 (#86).) Chudacoff asserts  
9 that the defendants did not follow these procedures and that their  
10 course of action violated his due process rights. The defendants  
11 contend that they followed their Bylaws and that nothing more was  
12 required.

13 The amount of process that is due is a "flexible concept that  
14 varies with the particular situation." Zinermon, 494 U.S. at 127.  
15 The Court tests this concept by weighing several factors:

16 First, the private interest that will be  
17 affected by the official action; second, the risk of  
18 an erroneous deprivation of such interest through the  
19 procedures used, and the probable value, if any, of  
20 additional or substitute procedural safeguards; and  
21 finally, the Government's interest, including the  
function involved and the fiscal and administrative  
burdens that the additional or substitute procedural  
requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

22 The private interest at stake here is the ability to practice  
23 medicine at a particular location. The interest extends further,  
24 however, in that a suspension of privileges at one hospital, when  
25 reported to the NPDB, could limit a physician's ability to practice  
26 anywhere in the country. The amount of process must accord  
27 sufficient respect for a professional's life and livelihood.

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1       Next, the risk of an erroneous deprivation is also significant,  
2 as an improper suspension would have dramatic consequences for the  
3 physician. Aside from the physician's concerns, the NPDB only  
4 serves as a reliable source of information if it receives accurate  
5 reports; an erroneous report reduces the NPDB's utility. As a  
6 result, there are substantial benefits to having procedural  
7 safeguards in place to protect both the physician and the NPDB from  
8 erroneous or improper reporting. Both are best served by having the  
9 safeguards in place on the front-end of the decision-making process;  
10 neither is served by remedial provisions. Once the damage is done,  
11 it is hard to undo.

12       Third, it is important for the state to have control over the  
13 quality of care that its physicians provide. Additionally, the  
14 state has an interest in insuring that it can discipline malfeasance  
15 without further burdening limited state resources.

16       Given the important interests outlined above, it simply cannot  
17 be that, in a typical administrative action situation, a physician  
18 may have his privileges revoked without ever having a chance to  
19 refute or challenge the accusations leveled against him. The MEC  
20 met late in May 2008 to discuss allegations concerning Dr.  
21 Chudacoff's level of care, allegations that Dr. Chudacoff did not  
22 know were being leveled against him. The MEC, under the guise of an  
23 administrative action, suspended Dr. Chudacoff's medical staff  
24 privileges.<sup>2</sup> Without ever even knowing that his privileges were in

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26       <sup>2</sup>It is not clear how the MEC was able to take an adverse action  
27 at this early time; the MEC likely could only "recommend" taking a  
certain course of action under the Fair Hearing Plan. (See  
Credentialing Manual, Ex. B at 78-79 (#85-4).)

1 jeopardy, Chudacoff was informed of the loss of his privileges on  
 2 May 28, 2008. The NPDB was informed of the suspension on June 16,  
 3 2008, well before Dr. Chudacoff ever had an opportunity to be heard  
 4 on the matter. The fatal flaw here is that the defendants suspended  
 5 Chudacoff's staff privileges before giving him any type of notice or  
 6 opportunity to be heard with respect to that suspension.  
 7 Chudacoff's due process rights were violated by the timing of the  
 8 MEC's actions.<sup>3</sup>

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10 **C. HCQIA Immunity**

11 Under the HCQIA, Congress sought to remedy the national need to  
 12 restrict incompetent physicians from moving from state to state  
 13 through effective professional peer review. See 42 U.S.C. §  
 14 11101(3). To alleviate concerns of lawsuits with respect to peer  
 15 review, Congress granted "limited immunity from suits for money  
 16 damages to participants in professional peer review actions."

17 Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 632 (3d Cir. 1996);  
 18 Austin v. McNamara, 979 F.2d 728, 733 (9th Cir. 1992) ("HCQIA was  
 19 designed both to provide for effective peer review and interstate  
 20 monitoring of incompetent physicians and to grant qualified immunity  
 21 from damages for those who participate in peer review activities.").

22 The defendants contend that Chudacoff's allegations stem from  
 23 the actions taken by the MEC, through its peer review process, in  
 24 response to patient safety concerns, and members of the staff who

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25  
 26 <sup>3</sup>In light of our conclusion, we need not resolve whether his due  
 27 process rights were also violated by any absence of a writing from Dr.  
 Ellerton to the MEC, or when Dr. Chudacoff's counsel was not allowed  
 to present his case at the hearing.

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1 participated in the peer review process are thus protected under the  
 2 immunity provisions of the HCQIA. Chudacoff responds that HCQIA  
 3 immunity is not a blanket grant of immunity, but is subject to  
 4 certain statutory requirements that were not met here. Chudacoff's  
 5 chief argument is that the MEC suspended his license prior to  
 6 providing him with any procedural safeguards. He notes that even  
 7 when he was allowed to present evidence at the Fair Hearing on  
 8 September 11, 2008, his suspension had already been reported to the  
 9 National Practitioner Data Bank.

10       Under the HCQIA, if a "professional review action," as defined  
 11 by the statute, meets certain due process and fairness requirements,  
 12 then the review participants "shall not be liable in damages . . .  
 13 with respect to the action." 42 U.S.C. § 11111. The HCQIA creates  
 14 a rebuttable presumption of immunity, forcing the plaintiff to prove  
 15 that the defendants' actions did not comply with the relevant  
 16 standards. 42 U.S.C. § 11112(a) ("A professional review action  
 17 shall be presumed to have met the preceding standards necessary for  
 18 . . . [immunity from damages] unless the presumption is rebutted by  
 19 a preponderance of the evidence."). This rebuttable presumption  
 20 "creates an unusual summary judgment standard" that can be stated as  
 21 follows: "Might a reasonable jury, viewing the facts in the best  
 22 light for [the plaintiff], conclude that he has shown, by a  
 23 preponderance of the evidence, that the defendants' actions are  
 24 outside the scope of § 11112(a)?" Bryan v. James E. Holmes Reg'l  
Med. Ctr., 33 F.3d 1318, 1333 (11th Cir. 1994) (quoting Austin, 979  
 25 F.2d at 734). The plaintiff must overcome the presumption of  
 26 immunity by showing that the review process was not reasonable. Id.  
 27

1       Whereas qualified immunity under § 1983 is a question of law  
 2 that provides immunity not merely from liability but from suit  
 3 altogether, Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), HCQIA  
 4 immunity "is immunity from damages only," Singh v. Blue Cross/Blue  
 5 Shield of Mass., Inc., 308 F.3d 25, 35 (1st Cir. 2002); Decker v.  
 6 IHC Hosps., Inc., 982 F.2d 433, 436 (10th Cir. 1992) (holding that  
 7 HCQIA immunity is "immunity from liability only," not immunity from  
 8 suit). HCQIA immunity does not shield a defendant from injunctive  
 9 relief. See 42 U.S.C. § 11111(a)(1).

10       For immunity to apply, the defendants must meet four  
 11 requirements. Austin, 979 F.2d at 733. First, the defendants must  
 12 comply with the fairness standards set forth in 42 U.S.C. §  
 13 11112(a). Id. Second, the defendants must provide adequate notice  
 14 and a hearing as provided in 42 U.S.C. § 11112(b). Id. Third, the  
 15 defendants must report the results of the review action to the  
 16 appropriate authorities in compliance with 42 U.S.C. §§ 11131-34.  
 17 Id. Fourth, the review action must have been commenced after the  
 18 effective date of the HCQIA: November 14, 1986. Id. No one  
 19 challenges the fourth criterion, so it need not detain us.

20

21                   **1. Fairness Elements of 42 U.S.C. § 11112(a)**

22       The fairness standards set forth in 42 U.S.C. § 11112(a) have  
 23 four sub-requirements. The section provides that a professional  
 24 review action must be taken:

25                   (1) in the reasonable belief that the action was in  
 26 the furtherance of quality health care,  
 27 (2) after a reasonable effort to obtain the facts of  
 28 the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. § 11112(a).

9 The defendants likely had a reasonable belief that their  
10 actions were taken in furtherance of quality health care. The  
11 "reasonable" standard is an objective test, not a subjective one.  
12 Austin, 979 F.2d at 734. Thus, the Court need not concern itself  
13 with claims of animosity on the part of some of the defendants; even  
14 if true, these claims would be irrelevant to an objective test. Id.  
15 The issue turns on whether the defendants could reasonably believe  
16 that suspending Dr. Chudacoff for the quality of care he provided  
17 furthers quality health care. It is possible that the suspension  
18 was to further quality health care at the UMC, as a hospital  
19 reasonably would not want to extend privileges to a physician that  
20 was not practicing medicine at an appropriate level.

21 Whether the defendants acted after a reasonable effort to  
22 obtain the facts of the matter is a closer question. The parties  
23 dispute how much of an investigation Dr. Ellerton undertook before  
24 referring the matter to the MEC. Given the "unusual" summary  
25 judgment standard with HCQIA immunity, a reasonable jury could  
26 conclude that the defendants' actions were outside the scope the  
27 HCQIA. The matter remains an open question of fact.

1       Turning to the third element, as we concluded above, the notice  
2 and hearing procedures afforded Dr. Chudacoff were constitutionally  
3 insufficient. The lack of a pre-deprivation hearing was  
4 fundamentally unfair to Dr. Chudacoff. Nevertheless, section  
5 11112(b), discussed below, provides a safe harbor for adequate  
6 notice and hearing under 42 U.S.C. § 11112(a)(3). We will address  
7 that issue below.

8       With respect to the fourth element, the parties disagree as to  
9 whether the action was warranted, and the parties disagree about  
10 whether the defendants engaged in "reasonable efforts" to obtain the  
11 facts of the matter. Again, this matter appears to be an open  
12 question.

13       At bottom, to have immunity under the statute, the defendants  
14 must meet all of the elements of 42 U.S.C. § 11112(a). The  
15 defendants have thus far failed to show that they provided Dr.  
16 Chudacoff with reasonable notice and hearing procedures of the  
17 adverse action against him. Thus, if we find that the defendants do  
18 not qualify for the safe harbor of 42 U.S.C. § 11112(b), then the  
19 open questions of fact become non-material to the question of  
20 summary judgment. We turn now to that issue.

21

## 22           **2. Notice and Hearing Elements under § 11112(b)**

23       Section 11112(b) provides a safe harbor for notice and hearing  
24 requirements. In part, the section provides:

25       A health care entity is deemed to have met the  
26 adequate notice and hearing requirement of  
27 subsection (a)(3) of this section with respect to a  
physician if the following conditions are met (or  
are waived voluntarily by the physician):

28

(1) Notice of proposed action

The physician has been given notice stating--

(A) (i) that a professional review action has been proposed to be taken against the physician,

(B) (ii) reasons for the proposed action,  
(i) that the physician has the right to request a hearing on the proposed action,  
(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating--

- (A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and
- (B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

42 U.S.C. § 11112(b).

The timing of the notice is critical to understanding this provision. The statute begins by using the present perfect progressive tense ("The physician has been given notice"), indicating that the action began in the past, has continued into the present, and may continue into the future. Next, the statute requires, again using the present progressive tense, that a physician be given notice that a "professional review action has been proposed to be taken." The verb "proposed" indicates that while the proposal of the review action has begun in the past, the "review action" has not yet come to fruition. Thus, for HCQIA immunity to apply, the notice given to the physician must state that a review action will come to be in the future. Were it sufficient for the defendants merely to give the plaintiff notice of the review action after the fact, the statute would read as follows: "The

1 physician has been given notice stating that a professional review  
2 action has been taken against the physician." This interpretation  
3 omits the operative phrase "proposed to be," which clearly denotes  
4 when in the course of events the review action must take place. It  
5 is not sufficient for the physician to be told, after the fact, that  
6 a review action has been taken against him already. The defendants  
7 have not met the requirements of the safe harbor provision.

8

### **3. Reporting Requirements of 42 U.S.C. § 11131-34**

10 The relevant reporting requirements of 42 U.S.C. §§ 11133-34  
11 require health care entities to report to the Board of Medical  
12 Examiners any adverse action that "affects the clinical privileges  
13 of a physician for a period longer than 30 days" within a specified  
14 time – in essence, not more than sixty days. It does not appear  
15 that there was anything procedurally deficient with the way in which  
16 Defendants reported Plaintiff's suspension to the Board.

17 Nevertheless, because the defendants did not comply with the  
18 notice and hearing requirements of the statute, they are not  
19 entitled to HCQIA immunity.

20

### **IV. Motion for Preliminary Injunction**

22 Chudacoff has also filed a motion for preliminary injunction  
23 (#85). Chudacoff seeks to require the defendants to withdraw the  
24 adverse information lodged with the NPDB with respect to Chudacoff's  
25 alleged substandard level of care.

26 Requiring the defendants to lift the NPDB report regarding  
27 Chudacoff's ability to practice medicine turns this motion into one

28

1 for a mandatory injunction. While the normal purpose of an  
2 injunction is to preserve the status quo before trial to preserve  
3 the rights of the parties, a mandatory injunction requires a party  
4 to perform a specific act to remedy allegedly harmful conduct.  
5 Texas & N. R.R. v. Northside Belt Ry., 276 U.S. 475 (1928). Courts  
6 require a higher burden to be met in order to issue mandatory  
7 injunctions, especially when the requested action would force the  
8 non-moving party to go beyond simply maintaining the status quo.  
9 Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1319-1320 (9th Cir.  
10 1994).

11 Chudacoff's requested injunction is rooted in the MEC's  
12 decision to suspend his hospital privileges without procedural  
13 safeguards. That is, there are two parts to Chudacoff's underlying  
14 claim: (1) he was denied procedural due process; and (2) the MEC  
15 improperly suspended his privileges.

16 Regarding this first claim, we concluded above that Chudacoff  
17 was denied his procedural due process rights. Nevertheless, we have  
18 not considered whether the MEC's decision was ultimately  
19 substantively correct. Nor need we venture down that path now.

20 Had Chudacoff been afforded the proper procedural due process,  
21 he would have had notice and a hearing before the MEC suspended his  
22 privileges. The MEC, however, would still have had the authority to  
23 recommend suspending Chudacoff's privileges had the appropriate  
24 basis been laid. After all of the administrative procedures had  
25 been followed – as outlined in the Fair Hearing Plan, the Bylaws,  
26 and the Credentialing Manual – then Chudacoff could still have lost  
27 his privileges. He could also have prevailed.

1 The remedy sought here would require the defendants to give  
2 Chudacoff the appropriate procedural due process. Whether or not we  
3 require the UMC to pull the adverse report with the NPDB now, the  
4 Court would remand the matter back to the MEC to decide the case as  
5 if Chudacoff had never been reported to the NPDB in the first place.

6 It appears from the papers before the Court that the case  
7 already is back before the MEC, just as the Court would have  
8 ordered. (See D.s' Opp. to Mtn. for TRO/PI at 6 ("The Board [of  
9 Trustees] ordered the parties to conduct a new Fair Hearing on the  
10 issues related to the May 27, 2008 actions by the MEC within the  
11 next sixty (60) days." (#92).)<sup>4</sup> Depending on how the substantive  
12 administrative proceedings turn out, it will become clear what  
13 further order, if any, the Court must issue. At the present time,  
14 it is premature to attempt to fashion any injunctive relief.

15 In short, the administrative process needs to run its course  
16 before the Court issues any injunctive relief, as the matter may be  
17 resolved without any additional Court action. While Dr. Chudacoff's  
18 procedural rights have been violated, it is too early to hazard a  
19 guess as to whether his substantive rights have been so affected.

## v. Conclusion

22 Prior to being deprived of a protected property interest, Dr.  
23 Chudacoff was entitled to notice and an opportunity to be heard. He  
24 was not afforded constitutionally sufficient procedural protections.  
25 Partial summary judgment in his favor is appropriate. Further, the

<sup>4</sup>It is not clear what result, if any, the MEC reached, though the hearing should have been held by March 20, 2009.

1 defendants are not entitled to HCQIA immunity because they did not  
2 comply with the required statutory provisions.

3 Additionally, the administrative procedures need to run their  
4 course before the Court may fashion any type of injunctive relief,  
5 if appropriate.

6

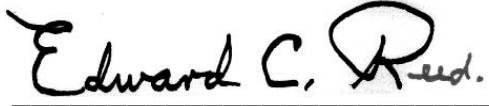
7 **IT IS, THEREFORE, HEREBY ORDERED** that Plaintiff's Motion for  
8 Partial Summary Judgment (#86) is GRANTED.

9 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Preliminary  
10 Injunction (#85) is DENIED.

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13 DATED: April 8, 2009.

14   
15 UNITED STATES DISTRICT JUDGE

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